No. 83-2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MATSUSHITA ELECTRIC INDUSTRIAL CO., LTD., *et al.*,
Petitioners,

—v.—

ZENITH RADIO CORPORATION and
NATIONAL UNION ELECTRIC CORPORATION,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

IRA M. MILLSTEIN
A. PAUL VICTOR
WEIL GOTSHAL & MANGES
New York, New York
Counsel for the Matsushita Petitioners

CARL W. SCHWARZ
METZGER, SHADYAC & SCHWARZ
Washington, D.C.
Counsel for the Hitachi Petitioners

DONALD F. TURNER
Washington, D.C.
Counsel for the MELCO Petitioners

CHARLES F. SCHIRMEISTER
REID & PRIEST
New York, New York
Counsel for the Mitsubishi Petitioners

DONALD J. ZOELLER
Counsel of Record
MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, New York 10038
(212) 510-7000
Counsel for the Toshiba Petitioners

PETER J. GARTLAND
WENDER MURASE & WHITE
New York, New York
Counsel for the Sharp Petitioners

KEVIN R. KEATING
WHITMAN & RANSOM
New York, New York
Counsel for the Sanyo Petitioners

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REPLY BRIEF FOR PETITIONERS

1. Respondents have raised no valid ground for denying the petition for certiorari. Instead, they have attempted to dissuade this Court from reviewing the important legal questions presented by the petition by asserting, without specific citation or support, that this Court must review what the District Court characterized as the "mountain of 'evidence' " proffered by respondents (Pet. App. 621a). But this Court need not review that "mountain" in order to correct the erroneous legal holdings of the Court of Appeals.

The District Court sifted through all of respondents' "evidence," painstakingly applied well-established legal standards, and concluded that a fact finder could not permissibly infer the conspiracy alleged.[1] The Court of Appeals, as petitioners' counsel explained below (Opp. 5), had "the same burden as the District Court" in reviewing the summary judgment record. Accordingly, it too had to examine respondents' "mountain." In its review, however, the Court of Appeals applied very different—and we submit erroneous—legal standards from those applied by the District Court. Based upon these different legal standards, the Court of Appeals reversed the District Court's summary judgment and consigned the parties, and an already over-burdened court system, to years more of protracted litigation and enormous expense.

The issue before this Court is thus clearly framed: what are the appropriate legal standards for reviewing the "mountain of 'evidence' " proffered by respondents—those applied by the District Court or the very different ones applied by the Court of Appeals? More specifically, petitioners seek to have this Court rule upon three clear-cut legal questions which ask whether, in reviewing the summary judgment record, the Court

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1 This is not surprising for, as the head of the Antitrust Division found after examining respondents' "best evidence" for more than "six months," there is "no evidence of concerted predatory conduct . . . either at an earlier period or at the present time." (Pet. App. 23a).

of Appeals applied the correct legal standards for: (i) inferring the alleged conspiracy; (ii) determining the effect to be given a duly issued statement by a friendly foreign government attesting that certain conduct challenged by respondents was compelled by that government acting within its sovereignty; and (iii) determining the admissibility and effect of expert testimony which was found to be based upon false and unsupported factual assumptions.

To answer these three questions of law, this Court need look no further than the opinions below, its own precedents, and common sense; the answers do not require this Court to make a *de novo* trip through the record.

If this Court finds that the Court of Appeals, as we assert, applied erroneous legal standards, it has two alternatives: (i) it may remand the case to the Court below with instructions to apply the correct legal standards. It will then be up to the Court of Appeals--not this Court—to consider the summary judgment record under the proper legal standards; or (ii) it may conduct its own review to determine whether to reinstate the District Court's judgment.[2]

The Conspiracy Inference Issue

2. The clear antitrust question presented by the petition is whether the Court of Appeals applied the correct legal standard in reversing the District Court's conclusion that there is no significant probative evidence capable of supporting a permissible inference of the conspiracy alleged. Specifically, the issue before the Court is whether, in a case "in which there is both direct evidence of certain kinds of concert of action [but not of the conspiracy alleged] and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occured" (Pet. App. 165a), an alleged conspiracy may be inferred from the totality of that evidence without satisfying the contrary-to-independent-economic-self-interest test for inferring a conspiracy that was set forth by this

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2 *See, e.g., Board of Education v. Pico*, 457 U.S. 853, 862-63 (1982); *Kleppe v. Sierra Club*, 427 U.S. 390, 396-98 (1976).

Court in *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968) ("*Cities Service*").

Notwithstanding respondents' representations to the contrary (Opp. 13-14, 18-21), the Court of Appeals created a new exception to the *Cities Service* standard in this case. As even respondents concede (Opp. 11), the Court of Appeals held that its prior decisions applying the *Cities Service* test were *not* applicable to this case because of the existence of "direct evidence of certain kinds of concert of action" (Pet. App. 165a). As a consequence of this ruling, the Court of Appeals did not even review, let alone reverse, the explicit findings of the District Court that *all* of the evidence relied upon by respondents to infer the alleged "low price" conspiracy—*e.g.*, the "parallel" acts of charging lower prices in the U.S. than in Japan and the offering of secret rebates to customers—was completely consistent with each petitioner's independent economic self-interest in competing for business in the United States and more probative of competition than conspiracy (Pet. App. 478a-479a; 497a-502a). Respondents' unsupported contentions that there is evidence of conduct by petitioners against their economic self-interests (Opp. 19-21) are thus irrelevant to this appeal, since the District Court found that there is no such evidence in the record, and the Court of Appeals nowhere even discussed this point in its decision.

3. Similarly, despite respondents' assertions to the contrary, the Court of Appeals did not find that the summary judgment record contains "direct evidence of the conspiracy that respondents allege" (Opp. 11). Respondents allege a unitary conspiracy to stabilize high prices in Japan *and* to fix artificially low prices in the United States (Pet. App. 48a). The Court of Appeals did not find "direct evidence" of this alleged conspiracy.

Neither of the two categories of "direct evidence of certain kinds of concert of action" which the Court of Appeals relied upon—the "direct evidence" relating to the alleged agreement to stabilize prices in the Japanese domestic market during the years 1964-66 (Pet. App. 172a-173a) or the "direct evidence"

relating to the MITI-mandated export control arrangements (Pet. App. 177a)—was found to be "direct evidence" of respondents' alleged unitary conspiracy to fix artificially low prices in the United States.

The "direct evidence" relating to price stabilization in Japan was found by the District Court to relate exclusively to the Japanese domestic market (Pet. App. 421a-432a). The Court of Appeals did not reverse this finding. Indeed, the District Court explicitly found, and the Court of Appeals did not question, that there is *no* direct evidence in the record of any connection between the alleged price stabilization in Japan and petitioners' exports to the United States (Pet. App. 455a-463a; 608a; 615a-616a). Even the Court of Appeals recognized that "direct evidence of some kinds of concert of action like price fixing in Japan" is, at best, "*circumstantial* evidence of [the alleged] broader conspiracy" (emphasis provided) (Pet. App. 165a).

Similarly, the "direct evidence" relating to the MITI-mandated export control arrangements was not found to constitute "direct evidence" of the alleged conspiracy to fix artificially low prices in the United States. On their face, such arrangements established *minimum* export prices and *maximum* customer limitations (Pet. App. 177a-178a)—provisions which could only have led to *higher* export prices (Pet. App. 327a-328a). Thus, while the arrangements were relied upon by the Court of Appeals as a circumstantial "feature" of the alleged unitary conspiracy (Pet. App. 167a, 178a-180a), they were not, and could not be, considered "direct evidence" of this alleged agreement.[3]

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3 Indeed, since only the purported predatory agreement to fix artificially *low* prices in the United States (the "export side" of the alleged unitary conspiracy) arguably raises issues within the subject matter jurisdiction of the United States and states a claim for which competitors of the petitioners might claim injury, the two categories of so-called "direct evidence" relied upon by the Court of Appeals—which, at best, evidence arrangements designed to *increase* prices—certainly cannot constitute any basis for dispensing with the *Cities Service* inference standard. There is simply no evidence in the record which could even arguably be characterized as "direct evidence" of the alleged conspiracy to fix artificially low prices in the United States.

That the Court of Appeals recognized there was no "direct evidence" of the conspiracy alleged by respondents is demonstrated by the Court's affirmance of summary judgment in favor of the Sony defendants. While respondents have argued that this affirmance was based upon the absence of "direct evidence" against the Sony defendants (Opp. 19), just the opposite is true. The Court of Appeals held that the same two categories of "direct evidence of certain kinds of concert of action" found to be applicable to the petitioners (*i.e.*, alleged price stabilization in the Japanese domestic market (Pet. App. 176a) and the MITI-mandated export control arrangements (Pet. App. 183a-184a)) *were* applicable to the Sony defendants. Nevertheless, it found such "direct evidence" to be "entirely too speculative" to reverse summary judgment—at least in the absence of any evidence that the Sony defendants charged "low" prices in the U.S., offered secret rebates, or engaged in other "parallel" acts in the export market found to be applicable to the petitioners (Pet. App. 184a-185a). Had the "direct evidence of certain kinds of concert of action" been "direct evidence" of the unitary conspiracy alleged by respondents, the Court of Appeals could not have held such evidence to be "entirely too speculative" to keep the Sony defendants in the case (Pet. App. 185a).[4]

4. In an effort to obscure the widespread applicability and importance of the antitrust issues presented by the petition, respondents' brief completely ignores the danger to competition policy that will arise if the lower courts are permitted to

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4 Respondents' attempt to distinguish *Cities Service* and its progeny (Opp. 16-17) completely misses the point. The issue is not whether *Cities Service* and cases following it involved "direct evidence" of the conspiracies alleged. Obviously, they did not, or there would have been no need to draw *any* inferences. Rather, the issue is whether those cases involved evidence of "parallel" acts only, as respondents have argued, or whether they actually involved, as petitioners have demonstrated (Pet. 11-13), the same type of evidentiary mix present in this case: a combination of "parallel" acts with other circumstantial evidence, including evidence which could be characterized as "direct evidence of certain kinds of concert of action."

cast aside *Cities Service* in a case such as this, in which competitors are trying to infer a "low price" conspiracy from the charging of lower prices in the U.S. than in Japan, the offering of secret rebates and other "parallel" acts which mirror competition (Pet. 15-17). As emphasized in the Brief Amicus Curiae filed by the American Association of Exporters and Importers and the Consumers for World Trade, this is an extremely serious public policy concern that warrants this Court's review. Dispensing with the *Cities Service* standard in this case will cast a significant chill upon competitors desiring to charge lower prices in the United States than in a foreign market, directly undermine the consumer welfare objectives of the Sherman Act,[5] and encourage the filing of vexatious lawsuits by companies trying to shield themselves from legitimate competition.[6]

5. There is also no merit in respondents' argument that the interlocutory character of the Court of Appeals' summary judgment ruling renders this case inappropriate for review (Opp. 5). While this Court does not ordinarily review interlocutory decisions, issues of law respecting the grant or denial of summary judgment must necessarily be reviewed in this procedural posture. *Cities Service* was a case in which this Court addressed antitrust inference issues in the context of a summary judgment ruling. And it is precisely the *Cities Service* issue that is raised by the Court of Appeals' decision. Thus,

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5 *See Copperweld Corp. v. Independence Tube Corp.*, 52 U.S.L.W. 4821, 4825 (U.S. June 19, 1984) (the primary objective of the Sherman Act is to foster "consumer interests").

6 It is of particular importance to apply the safeguards of *Cities Service* in a case such as this—which does not involve an economically plausible assertion that companies might agree to raise their prices in the United States to increase profits, but rather is based upon the inherently implausible assertion that companies would conspire to maintain "low, dumping price levels" (Opp. 6). As Professor Easterbrook has explained, this "story . . . does not make sense, and we are left with the more plausible inference that the Japanese firms . . . . just engaged in hard competition." F. Easterbrook, *The Limits of Antitrust* (University of Chicago Program in Law and Economics Working Paper No. 20, March 30, 1984), 28-9. Copies of this article have been lodged with the Clerk and served on respondents.

unless this Court grants certiorari to review this issue in the summary judgment context, the Third Circuit's new exception to the *Cities Service* summary judgment standard will evade review—effectively sounding the death knell to the use of summary judgment as an important case management tool by district courts trying to bring large antitrust conspiracy cases under control.[7]

6. There is similarly no substance to respondents' contention that the absence of an express reference to the Court of Appeals' Antidumping Act judgment in the questions presented deprives this Court of jurisdiction to review those aspects of the Antidumping Act decision which are expressly dependent upon the Court of Appeals' conspiracy analysis (Opp. 9-10). The petition points out that the Court of Appeals based its determination that there was sufficient evidence to create a genuine issue of material fact with respect to petitioners' "specific intent" under the 1916 Antidumping Act upon the *very same* inference of conspiracy which it found to be permissible in its antitrust decision (Pet. 8). This was true for respondents' claims of both concerted and *individual* 1916 Act violations (Pet. App. 218a-222a). Since the legal standards for drawing such a conspiratorial inference are precisely the issues set forth in the questions presented, it is obvious that the identical 1916 Act issues are "fairly included" within the petition, and that a reversal of the Court of Appeals' antitrust judgment will necessarily entail reversing the Court of Appeals' 1916 Act judgment as well (*See* Pet. 1, 8, 28).

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7 Nor is there any basis for respondents' argument that the various evidentiary rulings by the Court of Appeals make interlocutory review by this Court inappropriate (Opp. 10). The Court of Appeals' rulings on the admissibility of respondents' documentary evidence are not material to the outcome of this appeal. Even assuming the admissibility of all of the documentary evidence discussed by the Court of Appeals, application of the correct legal standard for inferring a conspiracy would compel an affirmance of the District Court's judgment. Indeed, as previously pointed out (Pet. 3-4, n.4), the District Court assumed the admissibility of all of respondents' key documentary evidence, but still found a complete absence of any proof showing actions by petitioners contrary to their economic self-interests.

The Act of State and Sovereign Compulsion Issues

7. Respondents simply ignore the fundamental act of state issue presented by the Court of Appeals' decision: the failure of the Third Circuit to give *conclusive* effect to the duly issued statement of the Japanese Government (the "MITI Statement," Pet. App. 6a-14a) attesting that export controls which the Court of Appeals held could be a "feature" of the alleged conspiracy were actually mandated by the Government of Japan (Pet. 20-22). While respondents argue that the Court of Appeals took the MITI Statement "at face value" (Opp. 25), the Government of Japan vehemently disagrees.[8] The fact is that the Court of Appeals did not even mention the MITI Statement, and held that conduct which the Japanese Government stated that it mandated could be found to be evidence of a private conspiracy (Pet. App. 179a-180a, 188a-189a). This ruling directly contravenes this Court's decision in *United States v. Pink*, 315 U.S. 203, 220 (1942), and constitutes a serious affront to the Government of Japan.

Respondents urge this Court not to consider the act of state and sovereign compulsion issues presented by the Third Circuit's decision until after the "development of a full factual record" (Opp. 27). In other words, respondents take the position that these issues are not ripe for review until after the fact finder is permitted to inquire into whether the Government of Japan was telling the truth when it stated that it compelled the export control arrangements at issue in this case. But it is precisely this inquiry that is prohibited by the act of state doctrine (Pet. 23-24). It is imperative that certiorari be granted *before* the fact finder is permitted to make this inquiry, which will irreparably and unlawfully infringe upon the sovereignty of Japan.

8. In an effort to sidestep the real issues presented by the petition, respondents have constructed a mythical argument by

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8 *See* the Note Verbale from the Government of Japan to the United States Department of State protesting the Third Circuit's decision (Jap. Gov. Br. App. 1a *et seq.*).

petitioners that the act of state and sovereign compulsion doctrines protect conduct which exceeds that compelled by the Japanese Government (Opp. 23-25). This is simply not the case. The Court of Appeals did not rely upon just non-government mandated behavior to infer the alleged conspiracy. It held that the export controls which the Japanese Government has stated that it compelled can be considered "features" of such a conspiracy in violation of U.S. law (Pet. App. 167a, 179a-180a). Indeed, the MITI-mandated "five-company rule" is the very linchpin of the Court of Appeals' conspiracy theory (Pet. App. 167a-168a), placing the act of state and sovereign compulsion doctrines directly at issue in this case.

9. Respondents' brief also ignores what the District Court recognized to be the "enormous implications for U.S. trade policy" of resolving the act of state and sovereign compulsion issues in this case (Pet. App. 387a). The Japanese Government, in both its Brief Amicus Curiae before this Court, and in its official diplomatic protest to the United States, has made clear its view that the decision of the Court of Appeals will "seriously hamper the smooth execution of the trade policy of the Japanese Government" and cause "increased uncertainty in the trade relations between Japan and the United States" (Jap. Gov. Br. App. 1a, 3a). Moreover, petitioners have been informed that the Governments of Great Britain and Australia, as well as other foreign governments, have made formal demarches to the United States Department of State expressing their concern over the serious implications that the Court of Appeals' decision poses for trade relations with the United States. Such legitimate concerns, raised by our major trading partners, are compelling reasons for this Court to grant certiorari.

10. There is no merit to respondents' claim that petitioners are precluded from raising before this Court their arguments under the act of state and sovereign compulsion doctrines (Opp. 22-23). As even respondents concede (Opp. 23, n.16), petitioners specifically addressed these issues in their briefs on appeal before the Third Circuit, and respondents replied to

them, although there was no need to press them at that time because the District Court had granted summary judgment on different grounds. However, when the Court of Appeals reversed the District Court's judgment, and went on to permit a conspiracy to be inferred from, among other things, petitioners' participation in the export control arrangements, the act of state and sovereign compulsion doctrines immediately were called into question. The sovereign compulsion point was expressly ruled upon in the Court of Appeals' decision (Pet. App. 188a-189a), and the conclusivity of the MITI Statement was reargued in the petition for rehearing which was denied by that Court.

The Expert Testimony Issue

11. Finally, respondents' discussion of Fed. R. Evid. 703 (Opp. 27-30) completely skirts the important expert testimony issue presented by the petition: whether expert testimony *found to be based upon false and unsupported factual assumptions* may nevertheless be admitted into evidence to defeat summary judgment, once it is found that the data the expert relied upon are "of the type" upon which other experts in his field reasonably rely. Respondents do not even address the conflict between the Third Circuit and other Courts of Appeals on this important issue (Pet. 26-28).

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the petition, it is respectfully prayed that this Court issue a writ of certiorari to review the judgments of the Court of Appeals.

Dated: July 18, 1984

Respectfully submitted,

IRA M. MILLSTEIN
A. PAUL VICTOR
JEFFREY L. KESSLER
KENNETH STEINTHAL
MARTIN S. HYMAN
MINDY J. SPECTOR
ELIZABETH A. JAFFE

WEIL GOTSHAL & MANGES
767 Fifth Avenue
New York, N.Y. 10153
Tel.: (212) 310-8000

RAYMOND T. CULLEN

MORGAN LEWIS & BOCKIUS
120 South Broad Street
Philadelphia, Pa. 19109
Tel.: (215) 481-9500

Attorneys for Matsushita Electric Industrial Co., Ltd.; Matsushita Electric Corporation of America; Matsushita Electric Trading Co.; and Matsushita Electronics Corporation

DONALD J. ZOELLER
Counsel of Record

JOHN L. ALTIERI, JR.
ROBERT A. CANTOR
HAROLD G. LEVISON
ROBERT A. JAFFE
SHELLEY B. O'NEILL

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
180 Maiden Lane
New York, N.Y. 10038
Tel.: (212) 510-7000

PATRICK T. RYAN

DRINKER BIDDLE & REATH
1100 Phila. Nat. Bank Bldg.
Philadelphia, Pa. 19107
Tel.: (215) 925-2700

Attorneys for Toshiba Corporation and Toshiba America, Inc.

CARL W. SCHWARZ
MICHAEL E. FRIEDLANDER
WILLIAM H. BARRETT
STEPHEN P. MURPHY
PAUL J. PANTANO, JR.

METZGER SHADYAC & SCHWARZ
1275 K Street, N.W.
Washington, D.C. 20005
Tel.: (202) 289-4520

H. WILLIAM TANAKA
LAWRENCE R. WALDERS
B. JENKINS MIDDLETON

TANAKA WALDERS & RITGER
1919 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Tel.: (202) 223-1670

CHARLES J. BLOOM

CONRAD KERR BLOOM
HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Hitachi, Ltd.; Hitachi Kaden Hanbai Kabushiki Kaisha; and Hitachi Sales Corporation of America

JIRO MURASE
PETER J. GARTLAND
GENE Y. MATSUO
PETER A. DANKIN
LANCE GOTTHOFFER

WENDER MURASE & WHITE
400 Park Avenue
New York, New York 10022
Tel.: (212) 832-3333

MATTHEW J. BRODERICK

DECHERT PRICE & RHOADS
1500 Market Street
Philadelphia, Pa. 19102
Tel.: (215) 972-3400

Attorneys for Sharp Corporation and Sharp Electronics Corporation

HOKEN S. SEKI
GEORGE E. JARVIS
DAVID A. DOPSOVIC

SEKI & JARVIS
520 Madison Avenue
New York, N.Y. 10022
Tel.: (212) 759-2303

HENRY T. REATH
FRANK A. LUCHAK

DUANE MORRIS & HECKSCHER
1500 One Franklin Plaza
Philadelphia, Pa. 19102
Tel.: (215) 544-6300

JOHN T. DOLAN
ARNOLD B. CALMANN

CRUMMY, DEL DEO, DOLAN & PURCELL
Gateway One
Newark, N.J. 07102
Tel.: (201) 522-2235

DONALD F. TURNER

WILMER CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
Tel.: (202) 872-6000

Attorneys for Mitsubishi Electric Corporation and Mitsubishi Electric Sales America, Inc.

CHARLES F. SCHIRMEISTER
PETER C. WILLIAMS

REID & PRIEST
40 West 57th Street
New York, N.Y. 10019
Tel.: (212) 603-2000

STEPHEN W. ARMSTRONG

MONTGOMERY MCCRAKEN WALKER & RHOADS
Three Parkway
Philadelphia, Pa. 19102
Tel.: (215) 563-0650

Attorneys for Mitsubishi Corporation and Mitsubishi International Corporation

PATRICK H. SULLIVAN
JAMES S. MORRIS
KEVIN R. KEATING
MICHAEL S. PRESS

WHITMAN & RANSOM
522 Fifth Avenue
New York, N.Y. 10036
Tel.: (212) 575-5800

CHARLES J. BLOOM

CONRAD KERR BLOOM
HITCHNER & O'BRIEN, P.C.
15th and Walnut Streets
Philadelphia, Pa. 19102
Tel.: (215) 864-0800

Attorneys for Sanyo Electric Co., Ltd.; Sanyo Electric Trading Co., Ltd.; Sanyo Electric, Inc.; and Sanyo Manufacturing Corporation